

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN RE: CAPITAL ONE CONSUMER)
DATA SECURITY BREACH LITIGATION) MDL No. 1:19-md-2915 (AJT/JFA)
_____)

This Document Relates to ALL Cases

**APPLICATION OF E. MICHELLE DRAKE OF BERGER MONTAGUE
FOR APPOINTMENT TO PLAINTIFFS' STEERING COMMITTEE**

I. INTRODUCTION

E. Michelle Drake¹ of Berger Montague PC (“BM”) seeks appointment to the Plaintiffs’ Steering Committee (“PSC”).

Ms. Drake is a shareholder and co-chair of the Technology, Privacy, and Data Breach practice at BM, a 65-attorney law firm with 125 employees and offices in Philadelphia, San Diego, Minneapolis, and Washington D.C. Ms. Drake is a dynamic leader with nationally recognized expertise leading privacy and data breach class actions. She has served as lead or co-lead class counsel in dozens of privacy class actions in courts across the country, including data breach cases. Ms. Drake is well-recognized by her peers for her expertise in issues related to privacy cases, and in particular for her command of strategy and caselaw relating to Article III standing in class actions, which will be a disputed issue in the Capital One case. She has litigated standing issues scores of times, and has been invited to speak at dozens of legal education seminars on issues related to standing. Ms. Drake’s commitment to the protection of consumer and civil rights has earned her an established place in the leadership of the national consumer protection bar. She serves on the boards of the National Association of Consumer Advocates, Public Justice, and the Minnesota Association for Justice, and is a member of the Partners’ Council for the National Consumer Law Center.

Ms. Drake has practiced law for 18 years and holds degrees from Harvard College, Oxford University, and Harvard Law School. A list of her relevant cases is attached as Ex. A, resume is available on request, and bio is at: bergermontague.com/attorneys/e-michelle-drake/.

A. Experience in This Type of Litigation

¹ Ms. Drake is counsel for plaintiffs in *Ouellete et al. v. Capital One Fin. Corp., et al.*, No. 19-cv-01203 (W.D. Wash.); *Easton v. Capital One Fin. Corp., et al.*, No. 19-cv-00574 (E.D. Va.); and *Busby et al. v. Capital One Fin. Corp., et al.*, No. 19-cv-01062 (E.D. Va.).

Ms. Drake's practice focuses on litigating consumer privacy class actions, including data breach class actions. She served as Liaison Counsel for the consumer track in *In re: Target Corp. Customer Data Security Breach Litig.*, No. 14-md-02522 (D. Minn.), a data breach class action involving the theft of personal information for over 100 million consumers that resulted in a settlement valued at over \$23 million. Ms. Drake was recently appointed to the leadership team in *In re: Am. Medical Collection Agency, Inc. Customer Data Security Breach Litig.*, No. 19-md-02904 (D. N.J.). Last year, Ms. Drake spearheaded BM's co-lead counsel role in *Beckett v. Aetna, Inc.*, No. 17-cv-03864 (E.D. Pa.), a privacy class action that involved public disclosure of confidential HIV information. Ms. Drake's team negotiated with Aetna to obtain immediate *pre-settlement* financial relief for individuals who experienced consequences like the loss of jobs and housing as a result of the disclosure. The case settled in 2018, achieving a ground-breaking \$17 million non-reversionary settlement fund, plus best-in-class injunctive relief.

Ms. Drake has served as lead or co-lead counsel in numerous other cases involving consumer privacy. Most recently, Ms. Drake served as co-lead counsel in a series of three national class actions against the Big Three credit reporting agencies which were substantially litigated and settled in this District with Judge Lauck. Each case was resolved for innovative injunctive relief valued in the *billions of dollars*, as well as for an *uncapped* claims fund and an expedited claims process for consumers who suffered actual damages as a result of the credit reporting agencies' violations. All told, the settlements resolved 48 cases brought by 17 different law firms. These cases were never subject to formal MDL proceedings, as, due in large part to Ms. Drake's leadership, all 17 plaintiffs' firms and all 3 defendants voluntarily agreed to settle the cases in this District without need for an MDL. See *Thomas et al. v. Equifax Info. Svcs., LLC*, No. 18-cv-00684 (E.D. Va.); *Anderson et al. v. TransUnion, LLC*, No. 16-cv-00558 (E.D. Va.);

Clark v. Experian Info. Solutions., Inc., No. 16-cv-00032 (E.D. Va.).

Ms. Drake has also served as lead or co-lead counsel in many cases involving consumer privacy outside this District, including, *e.g.*, *Rubio-Delgado v. Aerotek, Inc.*, No. 16-cv-01066 (S.D. Ohio) (FCRA class action for improper privacy disclosures to consumers resulting in a \$15 million settlement, the largest of its kind for similar claims); *Hillson v. Kelly Services, Inc.*, No. 15-cv-10803 (E.D. Mich.) (same, resulting in \$6.7 million settlement); *Knights v. Publix Super Markets, Inc.*, No. 14-cv-00720 (M.D. Tenn.) (same, resulting in \$6.75 million settlement).

In addition to her own personal leadership experience, Ms. Drake also brings the full support and resources of BM, a top-tier 65-plus lawyer plaintiff's class action firm that has a fifty-year history of protecting Americans' rights. BM's lawyers have deep experience in leading privacy and data breach class actions, including *In re: Experian Data Breach Litig.*, No. 15-cv-01592 (C.D. Cal.) (Executive Committee); *In re: Heartland Payment Sys., Inc. Customer Data Security Breach Litig.*, No. 09-MD-2046 (S.D. Tex.) (same); *In re: Countrywide Fin'l. Corp. Customer Data Security Breach Litig.*, No. 08-MD-01998 (W.D. Ky.) (same); *In re: TJX Cos. Retail Sec. Breach Litig.*, No. 07-cv-10162-WGY (D. Mass.) (co-lead counsel).

B. Experience in This District

Ms. Drake is currently litigating – or has previously litigated – over a dozen class actions in the Eastern District of Virginia. She is familiar with and welcomes the Court's expedited case management procedures. The consumer protection and class action cases she has litigated in this District have involved privacy concerns, credit reporting, and illegal payday lending.² BM has a

² See, *e.g.*, *Spendlove et al. v. RapidCourt, LLC*, No. 18-cv-00856 (E.D. Va.) (Payne, J.); *Smith et al. v. Innovative Enterp., Inc.*, No. 17-cv-00078 (E.D. Va.) (Allen, J.); *McBride et al. v. Apex Bkgrd. Check, Inc.*, No. 16-cv-00984 (E.D. Va.) (Gibney, J.); *Bartlow et al., v. Med. Fac. of Am., Inc.*, No. 16-cv-00572 (E.D. Va.) (Hudson, J.); *Galloway et al. v. Williams et al.*, No. 19-cv-00470 (E.D. Va.) (Payne, J.); *Turner et al. v. ZestFinance, Inc. et al.*, No. 19-cv-00293 (E.D.

track record of success in this District in other kinds of matters as well, including both antitrust and securities fraud.³

C. Willingness to Commit to a Time-Consuming Process

If appointed in this case, Ms. Drake is committed to fulfilling her responsibilities personally and will devote the time that this litigation deserves. BM has a nationally recognized willingness to commit its resources to litigation, no matter how long or arduous the commitment required. BM twice received Public Justice's Trial Lawyer of The Year Award for its role as lead counsel in in the Rocky Flats nuclear contamination litigation, a class action that took over 27 years, one trial, and two rounds of appeals to bring to resolution. *See Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181 (D. Colo.) (\$377 million jury verdict, increased to \$926 million with interest; settled on appeal for \$375 million in 2017).

In the Capital One case, Ms. Drake has filed three Complaints and represents seven plaintiffs. BM has been contacted by over 2,500 consumers who believe their personal information was compromised in the data breach. BM interviewed numerous of those consumers to learn how they were impacted and to help shape the allegations and damages theories in the litigation, and is prepared to work cooperatively with all other appointed counsel to proceed expeditiously to file a consolidated complaint and perform all other litigation tasks.

D. Ability to Work Cooperatively with Others

Ms. Drake has worked cooperatively and productively with many of the firms and

Va.) (Novak, J.); *Galloway et al. v. Big Picture Loans, LLC et al.*, No. 18-cv-00406 (E.D. Va.) (Payne, J.); *Solomon et al. v. Am. Web Loan, Inc. et al.*, No. 17-cv-00145 (E.D. Va.) (Morgan, J.).³ *See, e.g., In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-00361 (Allen, J.) (BM represented a class of direct purchasers of Celebrex in an action involving delayed market entry of generic versions of Celebrex, resulting in a \$94 million settlement); *In re PSINet, Inc., Securities Litig.*, No. 00-cv-01850 (Brinkema, J.) (BM, as co-lead counsel, obtained a \$17 million settlement on behalf of investors).

attorneys seeking leadership positions in this case. In its five decades of experience, BM has forged cooperative battle-tested relationships with many firms in this MDL.

Ms. Drake supports the joint application of James Pizzirusso of Hausfeld LLP, Amy Keller of DiCello Levitt Gutzler LLC, and Douglas McNamara of Cohen Milstein Sellers & Toll PLLC (the “Hausfeld Group”) for appointment as co-lead counsel. The Hausfeld Group is recommending that Ms. Drake be appointed to the PSC. Ms. Drake also supports appointment of the other proposed PSC members set forth by the Hausfeld Group, namely Jason Dennett of Tousley Brain Stephens PLLC, and Melissa Weiner of Pearson, Simon & Warshaw, LLP.

E. Willingness to Commit Resources to Pursue this Matter Expeditiously

BM is one of the nation’s oldest and most respected class action law firms. BM is well-capitalized, can fund any litigation, and contributes its own capital to its cases. BM recently litigated *Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 1:05-md-01720-JG-JO (E.D.N.Y.) (Brody, J.) as co-lead counsel, obtaining a settlement with Visa and Mastercard requiring payments of between \$5.54 billion and \$6.24 billion to the class, the largest-ever class action antitrust settlement in U.S. history. BM does not shy away from case commitments requiring millions of dollars. In terms of human resources, Ms. Drake intends to draw upon the talents and resources of her colleagues including Managing Shareholder Shanon Carson, Shareholder Jon Lambiras, and Associate Amey Park in litigating this case and meeting the Court’s litigation schedule. All of these individuals are immediately available to begin work as needed. The firm is prepared to commit additional resources as needed.

F. Compensation Arrangement

Ms. Drake supports the Hausfeld Group’s views on compensation and does not anticipate using third-party litigation financing from third parties.

Dated: November 18, 2019

Respectfully submitted,

By: /s/ E. Michelle Drake
E. Michelle Drake (*pro hac vice*)
Berger Montague, PC
43 SE Main Street, Suite 505
Minneapolis, MN 55414
Tel: (612) 594-5933
Fax: (612) 584-4470
Email: emdrake@bm.net